Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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86-1218

In The Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-

E.F. HUTTON & COMPANY, INCORPORATED and PETER PANOS,

Petitioners,

vs.

FREDERICK J. WOLFE and HEATHER B. WOLFE, his wife,

Respondents.

MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED,

Petitioner,

vs.

JOSEPH GORMAN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BENNETT FALK, ESQ.,
KEITH OLIN, ESQ.

RUDEN, BARNETT, MCCLOSKY, SCHUSTER & RUSSELL, P.A.
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60 pp

QUESTIONS PRESENTED

The federal Arbitration Act mandates enforcement of valid agreements to arbitrate statutory claims, unless Congress has otherwise expressly exempted the claims from arbitration. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 105 S.Ct. 3346 (1985). Whether judicially implied rights of action under § 10(b) of the Securities Exchange Act of 1934 ("§ 10(b)") are exempt from this arbitration mandate is an open question. *Dean Witter Reynolds, Inc. v. Byrd*, 105 S.Ct. 1238 (1985). The Court of Appeals held that arbitration of § 10(b) claims cannot be compelled.

Did the court below err in holding that the mandate of the federal Arbitration Act does not apply to rights of action implied under § 10(b)?

PARTIES TO THE PROCEEDING

All of the parties to the proceeding below are listed in the caption.*

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* Pursuant to Rule 28.1 of the Court, Petitioner MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED states that it is a subsidiary of Merrill Lynch & Co., Inc., a publicly-held corporation whose shares are traded on, among others, the New York Stock Exchange. Subsidiaries of MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED that are not wholly-owned are: Merrill Lynch & Co., Canada, Ltd., Merrill Lynch Canada Incorporated/Incorporee, Merrill Lynch Life Agency Inc. (Ohio), Merrill Lynch Life Agency Inc. (Oklahoma), Merrill Lynch Life Agency Ltd. (Mississippi), Merrill Lynch-Nomura Management Company, Inc., and ML Life Agency Inc. Affiliates of MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED that are not whollyowned by Merrill Lynch & Co., Inc. are: ISU Companies, Inc., Merrill Lynch Bank & Trust Co., Merrill Lynch International Bank Limited, Mership Nominees Limited, Michigan Mart Properties Corp., Peaback Properties, Inc., Iran Financial Services Company S.S.K., Merrill Lynch Asset Management Limited, Merrill Lynch (Australia) Pty Limited, Merrill Lynch, Pierce, Fenner & Smith (Brokers & Dealers) Limited, Merrill Lynch, Pierce, Fenner & Smith Limited, Royal Securities Corporation (Canada) Limited, Paluel-Marmont Merrill Lynch, S.A., Merrill Lynch Philippines, Inc., Merrill Lynch, Pierce, Fenner & Smith Belge S.A., Merrill Lynch, Pierce, Fenner & Smith (Middle East) S.A.L., Merrill Lynch, Pierce, Fenner & Smith S.A., Merrill Lynch S.A.L., Merrill Lynch, Pierce, Fenner & Smith (Taiwan) Ltd., Property Protection Associates & Co., Merrill Lynch-Sun Hung Kai (Overseas Securities) Company Limited, Sun Hung Kai-Merrill Lynch Commodities Limited, Merrill Lynch Representacoes Ltda., Merrill Lynch Realty Commercial Services of Georgia, Inc., Hammill-Quinlan, Inc., Merrill Lynch Realty North Bay, Inc., Merrill Lynch Realty/North Los Angeles, Inc., Merrill Lynch Realty/Boomhower, Inc., Merrill Lynch Realty/Burnet, Inc., Merrill Lynch Realty Carll Burr, Inc., Merrill Lynch Realty/ Cousins, Inc., Merrill Lynch Realty Santa Barbara, Inc., Merrill Lynch Realty/Jack Mathews, Inc., Merrill Lynch Realty/Katella, Inc., Merrill Lynch Realty/MCK, Inc., Merrill Lynch Realty/Richard Jowdy Inc., Merrill Lynch Realty/Robedeaux, Inc., Merrill Lynch Realty/Tom Fannin Inc., ML/Rodgers & Cummings Insurance Inc. Petitioner E.F. HUTTON & COMPANY,

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INCORPORATED states that it is a subsidiary of the E.F. Hutton Group, Inc., a publicly-held corporation whose shares are traded on, among others, the New York Stock Exchange. Subsidiaries of the E.F. Hutton Group Inc. are: Hutton Advantaged Housing Associates, Inc., Co-General Partner of Hutton Advantaged Properties II Ltd., Co-General Partner of Related & Hutton Associates L.P., Hutton Aircraft Management Inc., General Partner of Ambassador Partners I, General Partner of Hutton Equipment Partners, EFH Armory Park Inc., Joint Tenant of Armory Park Associates, Hutton Assisted Housing Associates, Inc., Co-General Partner of H/R Special Partnership, Hutton Assisted Housing, Inc., General Partner of Hutton Advantaged Properties, Ltd., General Partner of Hutton/Related Associates, EFH Atlantic Inc., Co-General Partner of Somerset Associates (a.k.a. Chubb Associates), Hutton/AREA Corporation, Co-General of Aetna Real Estate Associates L.P., Hutton/AREA Assignor Corporation, Hutton/AREA Depository Corporation, EFH Aurora, Inc., General Partner of EFH Aurora, Ltd., EFH Australia Inc., Hutton Aviation Inc., E.F. Hutton Bank, EFH Barge, Inc., Special Limited Partner of Wellspring Barge Limited Partnership, EFH Commerce Inc., Investor in Hutton Commodity International Ltd., Investor in Hutton Commodity International Ltd., Hutton Commodity Management Inc., General Partner of E.F. Hutton Commodity Limited Partnership II, General Partner of Hutton Commodity Partners, General Partner of Hutton Cash Fidelity Currency Fund Limited Partnership, General Partner of Hutton Zero Fidelity Currency Fund Limited Partnership, Investor in Hutton Commodity Reserve Fund Limited, Hutton Commodity Trading Limited, E.F. Hutton & Company Inc., E.F. Hutton & Co. Nominee, Ltd., HS Group Inc., HS Capital Inc., Monterey Farming Corporation, WSV Wines Inc., Hutton Hotels I, Inc., Co-General Partner of Mountainview Assoc. Ltd., Hutton Housing Services, Inc., Hutton Insured Mortgage Equities, Inc., Co-General Partner of Capital Source L.P., E.F. Hutton Interamericas Inc., E.F. Hutton International Inc., E.F. Hutton (Cayman) Inc., E.F. Hutton & Company (France) S.A.R.L., E.F. Hutton & Company GMBH, E.F. Hutton International S.A.M., E.F. Hutton International Ltd. (Cayman), E.F. Hutton International Limited (U.K.), E.F. Hutton (Securities) Limited, E.F. Hutton (London) Limited, E.F. Hutton Puerto Rico Inc., E.F. Hutton Stewart Smith Syndicated Management Company, Inc., E.F. Hutton Insurance Agency of Alabama Inc., E.F. Hutton Insurance Brokers of Arizona Inc., E.F. Hutton Insurance Brokerage Agency of Arkansas Inc., E.F. Hutton Insurance Agency of Hawaii Inc., E.F. Hutton Insurance

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Agency of Idaho, Inc., E. F. Hutton Insurance Brokers of Illinois Inc., E. F. Hutton Insurance Brokers of Indiana Inc., E.F. Hutton Insurance Brokers of Kentucky Inc., E. F. Hutton Insurance Brokers of Louisiana Inc., E.F. Hutton Insurance Brokers of Maine Inc., E. F. Hutton Insurance Brokers of Massachusetts Inc., E. F. Hutton Insurance Brokers of Missouri Inc., E.F. Hutton Insurance Agency of Montana, Inc., E.F. Hutton Insurance Agency of Nevada Inc., E. F. Hutton Insurance Brokers of New Hampshire Inc., E.F. Hutton Insurance Brokers of North Dakota Inc., E.F. Hutton Insurance Brokers of Oklahoma, Inc., E.F. Hutton Insurance Agency of South Dakota, Inc., E.F. Hutton Insurance Brokers of Texas, Inc., E.F. Hutton Insurance Brokers of Utah Inc., E. F. Hutton Insurance Brokers of Vermont Inc., E. F. Hutton Insurance Brokers of Virginia Inc., E.F. Hutton Insurance Agency of Wyoming Inc., Limited Partner of Ambassador Partners II, Limited Partner of Hutton K.B. Partners, Limited Partner of J.H. Foster & Company Limited Partnership, Investor in ACS Communications, Inc. Wts., Investor in The Aviation Group, Inc., Investor in Brasilinvest S.A. Investimentos, Participacoes E Negocios, Investor in Cash Reserve Management, Inc., Investor in Compact Video, Inc., Investor in Concord Asset Corp., Investor in Concord Asset Corp., Investor in DMA Systems Corporation Services D Preferred, Investor in Hutton AMA Cash Fund Inc., Investor in Hutton California Municipal Fund, Inc., Investor in Hutton Government Fund, Inc., Investor in Hutton Investment Series Inc., Investor in Hutton National Municipal Fund, Inc., Investor in Hutton New York Municipal Fund, Inc., Investor in Hutton Telephone & Telecommunications Tax-Advantaged Trust, Investor in Maritek Corporation, Investor in Municipal Cash Reserve Management, Inc., Investor in Natural Resources and Land Development Corp., Investor in Southern California Minority Capital Corp., Investor in Standard Dredging Corp., Investor in Standard Dredging Corp., Investor in The Wisconsin MESBIC, Inc., Heritage Cablevision 1983, Hutton Completion Services, Inc., Co-Gen. Partner of Hutton/Energy Assets Oil and Gas Completion Program, Co-Gen. Partner of Hutton/Energy Assets 2nd Oil and Gas Completion and Equipping Program, Co-Gen. Partner of Hutton/Energy Assets 3rd Energy Program, Guarantor of Funding Obligations of Hutton/ConAm Realty Investors 5, EFH Container Corp., Co-General Partner of Interocean Container Partners 80, Co-General Partner of Interocean Container Partners 81, EFH Corporation, Limited Partner of FLA Asset Management, Limited Partner of Trading Company of The West, EFH DeKalb, Inc., E.F.H. Del Amo, Inc., E.F.H. Del Amo II, Inc., E.F. Hutton Development Inc., E.F.H.

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Development Inc., Special Limited Partner of Ultimate Development Partners, Ltd., EFH Dunwoody, Inc., Co-General Partner of Lakeland Associates, E.F.H. Energy, Inc., General Partner of EFH Energy Limited Partnership, General Partner of EFH Energy Limited Partnership II, General Partner of EFH Energy Limited Partnership III, General Partner of EFH Science Limited Partnership, Hutton Energy Services Inc., Co-General Partner of Hutton/Apache 1982 Energy Income Fund, Ltd., Hutton Energy Services II Inc., Co-General Partner of Hutton/Indian Wells 1983 Energy Income Fund, Ltd., Co-General Partner of Hutton/Indian Wells 1984 Energy Income Fund, Ltd., Hutton Energy Services III Inc., Co-General Partner of Hutton/Apache Energy Income Fund II, Hutton Equipment Management Inc., General Partner of Hutton Asset Recovery Fund, Hutton Exploration Services, Inc., XCL 1982 Limited, Special Limited Partner of AOGP 1983, Anadarko Oil & Gas Partners 1983, Ltd., E.F. Hutton Finance Company N.V., E. F. Hutton Finance Ltd., E.F. Hutton Forest Management Corp., Co-General Partner of Timber Properties, EFH Fort Bend, Inc., Co-General Partner of Kanland Associates, EFH Grove Tower Inc., General Partner of EFH Grove Tower Associates, EFH Helena Corp., Co-General Partner of EFH Broadway Littleton Associates HS Group Inc., HS Capital Inc., Monterey Farming Corporation, WSV Wines Inc., E. F. Hutton Indemnity Co., Ltd., E. F. Hutton Insurance Company (Arizona), E. F. Hutton Insurance Group Inc., E. F. Hutton Life Insurance Company, Sage Insurance Service Corporation, World-Wide Reassurance Company Limited, E.F.H. Insurance Trust, EFH Investment Properties Inc., General Partner of Mariners Center Associates, EFH Jackson Corp., General Partner of III Capital Building Limited Partnership, EFH Kansas City Corp., General Partner of EFH Executive Park Associates, E.F. Hutton LBO Inc., Hutton Lease Properties Inc., Special Limited Partner of Secured Properties Associates, Hutton Manufactured Housing Services Inc., Hutton Manufactured Housing Communities I, Inc., General Partner of Realty Business Partners, Hutton Manufactured Housing Communities II, Inc., General Partner of Uniprop, Hutton MBS Enterprises, Inc., Ltd. Partner of America First Capital Associated Ltd. Partnership 4, General Partner of America First Tax Exempt Mortgage Fund 2 L.P., Hutton Media Inc., General Partner to Hutton Media L.P., Sp. Ltd. Partner of Malrite Guaranteed Broadcast Partners I Ltd. Partnership, Hutton Media Services Inc., General Partner of Broadcast Partners, I, L.P., E.F. Hutton Mortgage Corporation, EFH Pacific Inc., Co-General Partner of Claremont Associates, Hutton Participating Properties, Inc., Sp.

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Ltd. Partner of America First Capital Associated Ltd. Partnership 3, General Part. of America 1st Participating/Preferred Equity Morgtage Fund L.P., EFH Plaza, Inc., General Partner of Plaza Associates, E.F. Hutton Properties I Inc., General Partner of Kan/Del Hotel Investment Partners L.P., Hutton Real Equity Partners Inc., Co-General Partner of Guaranteed Income Equity Partners L.P., E.F. Hutton Real Estate Corp. of Texas, Hutton Real Estate Management Inc., Hutton Real Estate Investor Service Corp., Hutton Real Estate Services, Inc., Co-General Partner of Hutton/GSH Qualified Properties 80, Limited Partner of Hutton/GSH Commerical Properties 4, Hutton Real Estate Services I, Inc., Limited Partner of Colony Assoc., Ltd., Special Limited Partner of Turtle Hill Tennis Club Assoc., Special Limited Partner of Maui Hills Assoc., Ltd., Special Limited Partner of English Hill Apartments, Special Limited Partner of JMB/One Lincoln Associates, Ltd., Special Limited Partner of JMB/Indiana Square Associates, Ltd., Special Limited Partner of Wingfield Diversified, Special Limited Partner of JMB/Van Ness Associates, Ltd., Special Limited Partner of Pinewood Village Assoc., Ltd., Special Limited Partners of JMB/Woodland Hills Associates, Inc., Special Limited Partner of Princeville Assoc., Hutton Real Estate Services II, Inc., Co-General Partner of E.F. Hutton Southwest Properties 1, Co-General Partner of Con Real, Co-General Partner of E.F. Hutton Southwest Properties 2, Co-General Partner of Hutton Westgate Associate, Co-General Partner of Pacifica, Co-General Partner of Orchard Park Apartments, Co-General Partner of the Birches, Co-General Partner of Rivercrest Apartments Ltd., Co-General Partner of Norbro Equity Building Properties 1, Co-General Partner of Spring Meadows Associates Ltd., General Partner of Southridge Partners I, Co-General Partner of Broadway Park Associates, Ltd., General Partner of Coastal Commons, Co-General Partner of ConAm San Diego Residential Properties, Limited Partner of Spring Meadows Associates Ltd., Limited Partner of Southridge Partners I (1 Unit), General Partner of Arizona Development Partners, Hutton Real Estate Services III, Inc., Co-General Partner of Hutton/ConAm Realty Investors 81, Limited Partner of Hutton/ConAM Realty Investors 81, Hutton Real Estate Services IV, Inc., Co-General Partner of Hutton/GSH Commercial Properties 1, Limited Partner of Hutton/GSH Commerical Properties 1, Hutton Real Estate Services V, Inc., Co-General Partner of Hutton/ConAm Realty Investors 2, Limited Partner of Hutton/ConAm Realty Investors 2, Hutton Real Estate Services VI, Inc., Co-General Partner of Hutton/ConAm Realty Pension Investors, Hutton Real Estate Services VII, Inc., Co-

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General Partner of Hutton/GSH Commercial Properties 2, Co-General Partner of Hutton/GSH Commercial Properties 3, Hutton Real Estate Services VIII, Inc., Co-General Partner of Hutton/Con Am Realty Investors 3, Co-General Partner of Hutton/Con Am Realty Investors 4, Hutton Real Estate Services IX, Inc., Co-General Partner of Hutton/Con Am Realty Investors 5, Hutton Real Estate Services X, Inc., Hutton Real Estate Services XI, Inc., Co-General Partner of Hutton/GSH Commercial Properties 4, Hutton Real Estate Services XII, Inc., Hutton Real Estate Services XIII, Inc., Co-General Partner of Hutton Real-American Properties, Hutton Real Estate Services XIV, Inc., Hutton Real Estate Services XV, Inc., Co-General Partner of Mendik Real Estate L.P., Hutton Realty Advisors Inc., General Partner of Capital Beltway Limited Partnership, Hutton Risk Management Inc., Interest Rate Management Corp., Guarantor of Obligations of Hutton Risk Management Inc., EFH Rosemead, Inc., EFH Spear Tower, Inc., Hutton Storage Services, Inc., Co-General Partner of Hutton/GSH American Storage Properties, L.P., Hutton Subsidized Housing Services Inc., Special Limited Partner of Arbors Apartments Limited Partnership, Special Limited Partner of Brierwood Apartments Limited Partnership, Special Limited Partner of Forrest City Associates Limited Partnership, Special Limited Partner of Hicky Garden Limited Partnership, Special Limited Partner of Howard Hills Limited Partnership, Special Limited Partner of Hillside Apartments Limited Partnership, Special Limited Partner of Marked Tree Housing Limited Partnership, Special Limited Partner of The Meadows Associates, Special Limited Partner of Riverfront Associates Limited Partnership, Special Limited Partner of Savannah Properties, Ltd., Special Limited Partner of Somerville Housing Partners, Special Limited Partner of Sunridge Associates Limited Partnership, Special Limited Partner of Huron Plaza Limited Partnership, Special Limited Partner of Willow Oaks Associates, Special Limited Partner of Huron Plaza Limited Partnership, Hutton Subsidized Housing Services II Inc., General Partner of Hutton Subsidized Housing Partners I, General Partner of Hutton Subsidized Housing Partners II, General Partner of Hutton Subsidized Housing Partners III, General Partner of Hutton Subsidized Housing Partners IV, General Partner of Hutton Subsidized Housing Partners V, EFH Technology Inc., General Partner of Xebec Development Partners Ltd., Hutton Technology Services 1, Inc., Co-General Partner of Hutton/PRC Technology Partners, Ltd., Hutton Technology Services 2, Inc., Co-General Partner of Hutton/PRC Technology Partners 2, Hutton Timber Resources Corp., General Partner of Hutton Southern Timber Partners 1,

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Limited Partner of Hutton Southern Timber Partners 1, Hutton Timber Resources Corp. II, General Partner of Hutton Southern Timber Partners 2, Limited Partner of Hutton Southern Timber Partners 2, E.F. Hutton Trust Company, Hutton Venture Investment Partners Inc., General Partner of Hutton Investment Partnership I, General Partner of Hutton Investment Partnership II, General Partner of Hutton Investment Partnership III, EFH Village Green, Inc., General Partner of EFH Village Green, Ltd., Hutton (West Virginia) Exploration Services Inc., Special Limited Partner of Swift Energy 1983-A, Ltd., EFH Westlake, Inc., General Partner of EFH Westlake, Ltd., 1980 Equipment Leasing, Investor in AAC Holdings, Inc., Investor in AAC Holdings, Inc., America First Capital Associates Limited Partnership, General Partner of America First Federally Guaranteed Mortgage Fund, Investor in Annuities, Battery Park Credit Company, Financing Agent for Biotechnology Research Partners, Ltd., Battery Park Fuel Company of Alabama, Battery Park Management Corp., General Partner of Battery Park Associates, Bennington Management Corp., General Partner of Bennington Associates, Burgundy Management Corp., General Partner of Burgundy Associates, Investor in California Biotechnology Inc., California Biotechnology Research, Inc., General Partner of Biotechnology Research Partners, Ltd., Camden Management Corp., General Partner of Camden Associates, Canal Management Corp., General Partner of Canal Associates, Canope Credit Corp., Financing Agent for Americal Associates, Financing Agent for Great American Assoc., Financing Agent for Lakeland Associates, Financing Agent for Somerset Associates, Guarantor of certain obligations of Canope Credit Corp., Carey Computer Property Management, Inc., Investor in Celwave Technologies, Inc., Clarnodisteo Corp., Cliffwood Energy Company, Co-General Partner of Cliffwood Exploration Limited Partnership 1981, Co-General Partner of Cliffwood Exploration Limited Partnership 1982, Co-General Partner of Cliffwood Exploration Limited Partnership 1983, Co-General Partner of Cliffwood Exploration Limited Partnership 1984-A, Co-General Partner of Cliffwood Exploration Limited Partnership 1984-B, Guarantor of Indemnitors' performance of Cliffwood Exploration Ltd Part 1984-A, Guarantor of Indemnitors' performance of Cliffwood Exploration Ltd Part 1984-B, Commerce Credit Corporation, Financing Agent for One Commerce Square Associates, Investor in property in Cramerton, North Carolina, DNA Science Inc., DRA Management, Inc., Investor in Tripart II, Investor in Tripart III, Investor in Tripart IV, Investor in Tripart V, Investor in Tripart VI, Investor in

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Electronic Mail Corporation of America, Empire Computer Management Corp., General Partner of Empire Computer Associates, Employee Plan Services, Inc., Subordinated Loan to Employee Plan Services, Inc., Investor in Ensource Inc., Ethanol Services, Inc., Investor in New Energy Corporation of Indiana, General Partner of New Energy Company of Indiana, Fairport Management Corp., General Partner of Fairport Associates, Fifth Carey Corporate Property, Inc., General Partner of Carey Property Associates 5, Fifth Rig Management Corp., General Partner of Fifth Rig Associates, Investor in Triport VI, First Rig Management Corp., General Partner of First Rig Associates, Investor in Tripart II, Fourth Carey Corporate Property, Inc., General Partner of Carey Property Associates 4, Fourth Rig Management Corp., General Partner of Fourth Rig Associates, Investor in Tripart V, Franchise Finance Corporation of America, Co-General Partner of FFCA-85 Management Company, General Partaner of Insured Income Properties 1985, Investor in General Partner of Arby's Lease Partners 1981, Investor in General Partner of Hardee's Lease Partners 1980A, Investor in General Partner of Insured Income Properties 1982, Limited Partner of FFCA-85 Management Company, Investor in Getty Synthetic Fuels, Inc., HEI Corporation, Special Limited Partner of Anglo Drilling Associates Limited I, Special Limited Partner of Nordrill Limited II, Special Limited Partner of Petren Drilling Rig Limited—1981, Investor in Institutional Networks Corporation, Investor in Institutional Networks Corporation Wts., International Brokerage Information Systems, Inc., International Film Investors, Inc., Lefor Holdings Pty. Ltd., Investor in Microtel Inc., Mid-America Computer Management Corp., General Partner of Mid-America Computer Associates, Midwest Computer Management Corp., General Partner of Midwest Computer Associates, Oneida Computer Management Corp., General Partner of Oneida Computer Associates, Ovid Management Corp., General Partner of Ovid Associates, Panance Property Corp., General Partner of Broadway Oklahoma Assoc., Financing Agent for Atlantech Assoc., Financing Agent for Chatsworth Associates, Financing Agent for Claremont Associates, Financing Agent for Kanland Associates, Parish Management Corp., General Partner of Parish Associates, Quadra-Ex Oil And Gas Corporation, Sanmars Acquisition Corp., Co-General Partner of Timber Properties, Second Rig Management Corp., General Partner of Second Rig Associates, Investor in Tripart III, Silver Screen Management Inc., General Partner of Silver Screen Partners, Investor in Silver Screen Management Inc., S-A-L, Inc.,

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Summit Airlines, Inc., Sixth Carey Corporate Properties Inc., General Partner of Corporate Properties Associates 6, Investor in Southern Net, Inc., Investor in Tel-Optic, Ltd., Third Rig Management Corp., General Partner of Third Rig Associates, Investor in Tripart IV, Tri-Ex Oil & Gas Inc., Investor in Viking Energy Management Company, Investor in Viking Petroleum Management, Ltd., Investor in Vista Chemical Company, Western Computer Management Corp., General Partner of Western Computer Associates.

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In The Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-

E.F. HUTTON & COMPANY, INCORPORATED and PETER PANOS,

Petitioners,

vs.

FREDERICK J. WOLFE and HEATHER B. WOLFE, his wife,

Respondents.

MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED,

Petitioner,

vs.

JOSEPH GORMAN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioners, E.F. HUTTON & COMPANY INCORPORATED ("HUTTON"), PETER PANOS ("PANOS"), and MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED ("MERRILL LYNCH") respectfully request that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The en banc opinion of the Court of Appeals for the Eleventh Circuit (App.Ex."A")[1] is reported at 800 F.2d 1032 (11th Cir. 1986). The decision of the district court in *Gorman v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, (App.Ex."B") Case No. 84-1299-Civ-Nesbitt (S.D.Fla. April 22, 1985) is unreported. The decisions of the district court in *Wolfe v. E.F. Hutton & Co., Inc.*, (App.Ex."C", "D") Case No. 84-151-Civ-ORL-18 (M.D.Fla. March 30, 1985, April 23, 1985) are unreported.

JURISDICTION

The Court of Appeals issued its *en banc* decision on September 29, 1986. Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The appendix to this petition sets forth the relevant statutory provisions. (App.Ex."F").

STATEMENT OF THE CASE

A. WOLFE v. E.F. HUTTON & COMPANY, INC.

This is a suit for alleged churning of a securities account maintained by Plaintiffs, FREDERICK J. WOLFE and HEATHER B. WOLFE with Defendants, E.F. HUTTON & COMPANY, INC. and PETER PANOS. Mr. PANOS served as account executive for Plaintiffs' account. Count I of the Complaint purports to join claims for violations of §17(a) of the Securities Act of 1933, 15 U.S.C. §77(q), §10(b) of the Securities Exchange Act of 1934, 15 U.S.C. §78j, and the Florida Securities Act, §517.301, Florida Statutes. Counts II, III and IV purport to allege Florida common law claims of breach of fiduciary duty, gross negligence and "outrage" (apparently intentional infliction of emotional distress).

Defendants initially moved to dismiss the suit, or, alternatively, to compel arbitration of the state law claims pursuant

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[1] Citations to material printed in the annexed Appendix appear as "App.Ex. ".

to an arbitration agreement between the parties enforceable under the Federal Arbitration Act, 9 U.S.C. §§1-14. Defendants' motion further sought to stay arbitration pending judicial proceedings on the federal securities law claims; a procedure denominated as "ordering" in *Raiford v. Buslease, Inc.*, 745 F.2d 1419 (11th Cir. 1984).

Subsequently, on March 26, 1985, following the issuance of the United States Supreme Court's opinion in *Dean Witter Reynolds Inc. v. Byrd*, U.S. , 105 S.Ct. 1238 (1985), Defendants filed a Notice of Reliance Upon Supplemental Authority and Amendment to their Motion to Compel Arbitration. Based upon *Byrd*, Defendants amended their Motion to Compel Arbitration to delete the argument that arbitration should proceed under the ordering concept and instead moved that arbitration be ordered to proceed immediately without restriction. Defendants further amended the motion to add a demand for arbitration of Plaintiffs' claims under §10(b) of the Securities Exchange Act of 1934.

In his order dated March 30, 1985 the Honorable Judge G. Kendall Sharp denied Defendants' Motion to Dismiss or Compel Arbitration without issuing a written opinion.

Defendants timely filed a Motion for Reconsideration respectfully moving the District Court to reconsider its March 30, 1985 Order denying Defendants' Motion to Compel Arbitration. In the accompanying memorandum of law Defendants suggested that their March 26, 1985 Notice of Reliance upon *Byrd* apparently had not come to the attention of the district court prior to the March 30, 1985 Order denying arbitration and reiterated their argument presented therein. However, by Order dated April 23, 1985, Judge Sharp denied Defendants' Motion for Reconsideration, again without issuing a written opinion.

B. GORMAN v. MERRILL LYNCH, PIERCE, FENNER & SMITH INC.

This action was commenced by the filing of a four (4) count Complaint against Defendant/Petitioner, MERRILL

LYNCH, PIERCE, FENNER & SMITH INC. ("MERRILL LYNCH") and Defendants, MICAH HOLLANDER ("HOLLANDER") and MICHAEL STRAUSS ("STRAUSS"). Defendants moved to dismiss, or in the alternative, to compel arbitration of the arbitrable claims. By Order dated September 26, 1984, the district court granted Defendants' Motion and dismissed the action without prejudice and with leave to file an Amended Complaint.

Plaintiff, JOSEPH GORMAN ("GORMAN") filed his first Amended Complaint against MERRILL LYNCH, dropping HOLLANDER and STRAUSS as parties to the federal proceeding. GORMAN's First Amended Complaint purported to state claims under §10(b) of the Securities Exchange Act of 1934 ("the 1934 Act"), 15 U.S.C. §78j(b) and Rule 10b-5 promulgated thereunder (Count I); §517.301 of the Florida Investor Protection Act (Count II); common law fraud (Count III); and Chapter 812, Florida Statutes (Count IV).

In response to GORMAN's First Amended Complaint, MERRILL LYNCH moved to dismiss all counts, or in the alternative, to compel arbitration of the state law claims asserted in Counts II-IV. When the United States Supreme Court handed down its opinion in *Dean Witter Reynolds, Inc. v. Byrd*, U.S. , 105 S.Ct. 1238 (1985), MERRILL LYNCH amended its motion to compel arbitration to include arbitration of the 1934 Act claims alleged in Count I of the Amended Complaint. By Order dated April 1, 1985, the district court granted MERRILL LYNCH's motion to compel arbitration of Counts II-IV, while denying the motion to dismiss Count I [reported as *Gorman v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 609 F.Supp. 1054 (S.D.Fla. 1985)]. Subsequently, by Order dated April 22, 1985 the district court denied MERRILL LYNCH's motion to compel arbitration of Count I. MERRILL LYNCH appealed from the district court's Order of April 22, 1985.

C. APPELLATE PROCEEDINGS

The *Wolfe* and *Gorman* appeals were consolidated for oral argument which was held November 19, 1985. However,

because former-Fifth and Eleventh Circuit precedent had already ruled that §10(b) claims were not arbitrable, the panel did not possess the authority to reverse the District Courts' Orders. Accordingly, a written opinion was issued December 19, 1985 affirming the District Courts' decisions solely on the basis of these prior decisions and the rule that they could be overruled only by the Court sitting *en banc*. The panel did reverse the district court's ruling in *Wolfe* to the extent it denied arbitration of the state law claims. Given disposition of the appeals on these grounds, the panel decision did not discuss or otherwise reflect consideration of the merits of the arguments made by Appellants for arbitration of §10(b) claims.

Appellants filed a Petition for Rehearing En Banc of the December 19, 1985 Opinion, which was granted by Order dated February 28, 1986. Adhering to the established law of the Eleventh Circuit, the *En Banc* Court of Appeals held that a pre-claim agreement to arbitrate §10(b) claims is not enforceable. *Wolfe v. E.F. Hutton & Co., Inc.*, 800 F.2d 1032 (11th Cir. 1986).

REASONS FOR GRANTING THE WRIT

The Court has admonished repeatedly that the Federal Arbitration Act reflects "a national policy" mandating enforcement of valid arbitration agreements—a mandate that may not be avoided unless Congress has explicitly exempted a particular statutory claim from it. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 105 S.Ct. 3346, 3353-54 (1985).[2] The Court expressly has left unanswered whether the congressional bar it found to arbitration of claims asserted under the Securities Act of 1933, 15 U.S.C. § 77a *et seq.*[3] applies equally to judicially implied rights of action

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[2]See also *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983); *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

[3]See *Wilko v. Swan*, 346 U.S. 427 (1953) (barring arbitration of claims asserted under Section 12(2) of the Securities Act of 1933, 15 U.S.C. § 77(1)(2)).

asserted under the Securities Exchange Act of 1934, 15 U.S.C. § 78a *et seq. Dean Witter Reynolds, Inc. v. Byrd,* 105 S.Ct. 1238, 1240 n.1 (1985).[4]

This case squarely raises the arbitrability of 1934 Act claims. This issue, we respectfully submit, warrants determination by this Court.

I. The Arbitrability of Claims Under the 1934 Act is an Issue of National Significance

The issue presented by this case is significant, not only for MERRILL LYNCH and HUTTON, but for the entire securities industry and for thousands of brokerage customers as well. The issue is equally significant to the administration of justice in the federal court system. Hundreds, if not thousands, of lawsuits are filed annually seeking relief under the 1934 Act.[5] Cumulatively, these cases—including many meritless claims—impose an enormous cost upon an already overburdened court system as well as upon the securities industry.

This is so even though the claimants in most of these cases have contractually committed to arbitrate any disputes with their securities brokers. As a result of the decision below and

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[4] In *Byrd,* reiterating reservations expressed earlier in *Scherk v. Alberto-Culver Co.,* 417 U.S. 506 (1974), the Court questioned those lower federal court decisions that had simply transferred the bar to arbitration of 1933 Act claims to allegations made under the 1934 Act. Justice White, concurring, observed that the issue of the arbitrability of 1934 Act claims "remains open and the contrary holdings of the lower courts must be viewed with some doubt." 105 S.Ct. at 1244 (White, J., concurring).

[5] Statistics filed by the Administrative Office of the United States Courts indicate that over 3,064 private civil actions under federal "Securities, Commodities and Exchanges" statutes were filed in the district courts between April 1, 1985 and March 31, 1986. See Administrative Office of the United States Courts, *Federal Judicial Workload Statistics for the Twelve Month Period Ended March 31, 1986,* Table C-2 at 13.

decisions in other circuits that have ruled similarly,[6] however, the strong congressional policy favoring enforcement of such agreements has been nullified, and the public cost Congress sought to avoid through the Arbitration Act has become instead an increasing public burden.

The arbitrability of 1934 Act claims has been litigated in well over 100 cases decided since *Byrd*. (See App.Ex."E"). In sum, the issue here involved is widely litigated, of industry-wide significance and national application. Absent action by the Court now, the surge of litigation is certain to continue, and inconsistent results of the sort that have already appeared are bound to proliferate—to the detriment of litigants and the courts alike.

II. A Direct Conflict Exists Between the Circuits as to the Arbitrability of 1934 Act Claims

MERRILL LYNCH and HUTTON, indeed the entire securities industry, faces diametrically opposed decisions in different circuits as to the arbitrability of 1934 Act claims. The circuits have expressly recognized the need for a resolution by the Court.

The court below relied upon *Wilko* and pre-*Byrd* precedent in the Eleventh Circuit and held that the bar to arbitration of claims under the 1933 Act applied equally to claims asserted under the 1934 Act. (App.Ex."A"). In doing so, the court

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[6] See *Conover v. Dean Witter Reynolds, Inc.*, 794 F.2d 520 (9th Cir. 1986), *pet. for cert. filed*, No. 86-321 (Aug. 29, 1986); *McMahon v. Shearson/American Express, Inc.*, 788 F.2d 94 (2d Cir. 1986), *pet. for cert. granted*, 107 S.Ct. 60 (1986); *Kidder, Peabody & Co. v. Intre Sport, Ltd.*, 795 F.2d 1004 (2d Cir. 1986), *pet. for cert. filed*, No. 86-40 (July 16, 1986); *King v. Drexel Burnham Lambert, Inc.*, Fed.Sec.L.Rep. (CCH) ¶ 92,872 (5th Cir. May 28, 1986), *pet. for cert. filed*, No. 86-282 (August 25, 1986); *Jacobson v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 797 F.2d 1197 (3d Cir. 1986), *pet. for cert. filed*, No. 86-487 (September 25, 1986); *Delman v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 796 F.2d 478 (9th Cir. 1986), *pet. for cert. filed*, No. 86-668 (Oct. 23, 1986).

acknowledged the direct conflict of its holding with that of the Eighth Circuit in another litigation against MERRILL LYNCH, *Phillips v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 795 F.2d 1393, n.8 (8th Cir. 1986), *pet. for cert. filed*, No. 86-578 (Oct. 7, 1986).

In *Phillips* the Eighth Circuit, after extensive analysis in light of the Court's decision in *Byrd*, directed arbitration, concluding that the bar to arbitration of claims under the 1933 Act *did not* apply to 1934 Act claims.[7]

In so doing, the *Phillips* court recognized its decision, in turn, would conflict with a recent opinion of the Second Circuit holding 1934 Act claims to be nonarbitrable. *McMahon v. Shearson/American Express, Inc.*, 788 F.2d 94 (2d Cir. 1986), *pet. for cert. granted*, 107 S.Ct. 60 (1986). The Eighth Circuit faced this divergence directly:

> [Federal appellate courts, in the absence of precedent in their own circuit, tend to rely on precedent in other circuits. Ordinarily, then, in deciding a case of this kind, we would

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[7] Citing Justice White's concurring opinion in Byrd, the Eighth Circuit concluded:

> [A] plaintiff's cause of action under §10(b) and Rule 10b-5 differs in important respects from his or her cause of action under §12(2) . . . . First, the §10(b) and Rule 10b-5 private cause of action is implied rather than express . . . . Second, unlike in a §12(2) action, the plaintiff in an action under Section 10(b) and Rule 10b-5 bears the burden of proving scienter.
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> * * * *
>
> Based on these differences between the 1933 and 1934 Acts, and on the strong federal policy favoring enforcement of arbitration agreements, we conclude that *Wilko's* holding and rationale does not extend to claims arising under §10(b) of the 1934 Act and Rule 10b-5. The non-waiver provision of the 1934 Act, §29(a), simply does not override the Arbitration Act in the same manner as §14 of the 1933 Act when it is not buttressed by special rights and broad jurisdictional provisions similar to those found in the 1933 Act.

Phillips, 795 F.2d at 1398-98 (citations and footnote omitted).

> defer to the opinion of another circuit, such as rendered by the Second Circuit in *McMahon*, and avoid creating a conflict within the circuits. We believe, however, that the Supreme Court's opinion in *Scherk* and *Byrd* have invited a reexamination of the applicability of *Wilko* claims arising under § 10(b) of the 1934 Act and Rule 10b-5. Because we are not bound by the precedents of other circuits, we are free to make a new assessment of this issue. We have made that assessment, and now create a conflict within the circuits. *We assume the Supreme Court will eventually decide this question.*

795 F.2d at 1399 (emphasis added). *See also, Page v. Moseley, Hallgarten, Estabrook & Weeden, Inc.*, ___ F.2d ___, No. 86-1021 (1st Cir. November 26, 1986), where the court of appeals, noting the division among the circuits, agreed with the result reached in *Phillips* and concluded that disputes involving Rule 10b-5 of the 1934 Act are properly arbitrable.

In short, the conflict among the circuits is advertent and direct. Only a ruling by the Court will resolve it.

CONCLUSION

Congress enacted the Federal Arbitration Act to establish "a national policy." Yet, federal law as to the arbitrability of § 10(b) disputes is now in hopeless conflict. That conflict, advertently created by the circuit courts, impacts the resolution of thousands of disputes throughout the country and creates uncertainty for the entire securities industry as well as the investing public. The conflict will continue until the Court resolves it, which, we urge, the Court should do now. The Court should issue a Writ of Certiorari to review the decision below.

DATED: December 23, 1986

Miami, Florida

Respectfully submitted,

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APPENDIX A

FREDERICK J WOLFE, and HEATHER B. WOLFE, his wife, Plaintiffs-Appellees,

v.

E.F. HUTTON & COMPANY, INC., and PETER PANOS, Defendants-Appellants.
JOSEPH GORMAN, Plaintiff-Appellee,

v.

MERRILL LYNCH, PIERCE FENNER AND SMITH, INC., a foreign corporation, Defendant-Appellant,

MICAH HOLLANDER, MICHAEL STRAUSS, Defendants.

Nos. 85-3352, 85-5419.

United States Court of Appeals, Eleventh Circuit.

Sept. 29, 1986.
As Amended Oct. 9, 1986.

Action was filed alleging violations of antifraud provision of Securities Exchange Act and state law. The United States District Court for the Southern District of Florida, Lenore Carrero Nesbitt, J., 609 F.Supp. 1054, held that defendant was entitled to compel arbitration on state claims, and plaintiff appealed. In another action, investers brought securities fraud action against their broker, alleging illegal "churning" in their accounts. The United States District Court for the Middle District of Florida, No. 84-151-Civ Orl-18, George Kendall Sharp, J., denied broker's motion to compel arbitration, and broker appealed. The Court of Appeals, 780 F.2d 1032, ruled that state claims were arbitrable. On rehearing en banc, the Court of Appeals, Vance, Circuit Judge, held that securities fraud claims were not subject to mandatory arbitration under arbitration agreement entered into before claims arose.

Affirmed in part and reversed in part.

Tjoflat, Circuit Judge, filed concurring opinion in which Hill, Circuit Judge, joined.

Exchanges—11(11)

Securities fraud claims brought under Securities Exchange Act of 1934 and, Rule 10b-5 were not subject to mandatory arbitration under arbitration agreement entered into before claims arose; declining to follow *Phillips v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 795 F.2d 1393 (8th Cir.). Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b); Securities Act of 1933, § 12(2), 15 U.S.C.A. § 771(2).

Keith Olin, Bennett Falk, Miami, Fla., defendants-appellants.

Parker, Johnson, Owen & McGuire, Elmo R. Hoffman, Orlando, Fla., Greenfield & Chimicles, E. Stirling Lathrop, Haverford, Pa., Karen A. Gievers, Anderson Moss Russo Gievers & Cohen, P.A., Miami, Fla., plaintiffs-appellees.

Albert J. Beveridge, III, John S. Guttmann, Robert H. Singletary, Jr., for amicus curiae, Werner Heierli.

Beveridge & Diamond, Washington, D.C., for amicus curiae.

Appeals from the United States District Court for the Southern District of Florida.

Before RONEY, Chief Judge, GODBOLD, TJOFALT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HATCHETT, CLARKE and EDMONDSON, Circuit Judges,* and HENDERSON,** Senior Circuit Judge.

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* Honorable R. Lanier Anderson, Circuit Judge, did not participate in the consideration of disposition of this appeal.

** Honorable Albert J. Henderson, Senior Circuit Judge, has elected to participate in the consideration and disposition of this case. 28 U.S.C. § 46(c).

VANCE, Circuit Judge:

We granted rehearing en banc in these cases to determine whether claims brought under section 10b-5 of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and corresponding Securities and Exchange Commission Rule 10b-5, 17 C.F.R. § 240.10b-5, are subject to mandatory arbitration under an arbitration agreement entered into before the claim arose. Adhering to the established law of this circuit, we held that a pre-claim agreement to arbitrate such claims is not enforceable.

I.

Appellees Frederick and Heather Wolfe and Joseph Gorman brought separate suits in their respective district courts in Florida claiming that their respective brokers, E.F. Hutton and Merrill Lynch,[1] were liable under 10b-5[2] and state law for illegally "churning" their accounts—engaging in excessive trading to generate high commissions. In both cases, appellants had signed agreements upon setting up their accounts which included clauses providing that disputes over the accounts would be submitted to arbitration. The brokers, appellants here, sought to enforce the agreements with respect to both the 10b-5 claims and those arising under state law. The district court in *Wolfe,* No. 85-3352, denied appellant E.F. Hutton's motion to compel arbitration in its entirety. The district court in *Gorman*, No. 85-5419, granted appellant Merrill Lynch's similar motion with respect to the state claims, but denied arbitration of Gorman's 10b-5 claim.

On appeal, a panel of this court held that the district courts had properly denied arbitration of the 10b-5 claims but that the *Wolfe* court should have granted the motion to compel arbitration of the Wolfes' state claims. *Wolfe v. E.F. Hutton & Co.*, 780 F.2d 1032 (11th Cir. 1985); *Gorman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 780 F.2d 1032 (11th

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[1] Appellees' individual brokers at E.F. Hutton and Merrill Lynch were also named as defendants.

[2] We use "10b-5" to refer both to Rule 10b-5 and to section 10(b).

Cir. 1985) (consolidated appeals). The panel noted that under the Supreme Court's decision in *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1985), the arbitration agreement between E.F. Hutton and the Wolfes was enforceable with respect to claims arising under state law.[3] The court also noted, however, that under *Belke v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 693 F.2d 1023, 1025-26 (11th Cir. 1982), an agreement to submit a 10b-5 claim to arbitration cannot be enforced. Holding *Belke* to be binding precedent, the court rejected appellants' contention that *Belke* and an earlier case from the former fifth circuit, *Sibley v. Tandy Corp.*, 543 F.2d 540, 543 & n.3 (5th Cir. 1976), *cert. denied*, 434 U.S. 824, 98 S.Ct. 71, 54 L.Ed.2d 82 (1977), had been undermined by dicta in the Supreme Court's *Byrd* decision and by Justice White's concurring opinion in that case.

Doubt cast by *Byrd* on the continuing validity of *Sibley* and *Belke* has led us to consider the issue of 10b-5 arbitration en banc.

II.

The holding of *Belke* and *Sibley* that 10b-5 claims are not arbitrable[4] stems from the Supreme Court's decision more than thirty years ago in *Wilko v. Swan*, 346 U.S. 427, 74 S.Ct. 182, 98 L.Ed. 168 (1953). In that case the Court held that claims arising under section 17(2) of the Securities Act of 1933, 15 U.S.C. § 771(2) are not subject to arbitration

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[3] We reinstate the panel opinions—*Wolfe v. E.F. Hutton & Co.*, 780 F.2d 1032 (11th Cir. 1985); *Gorman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 780 F.2d 1032 (11th Cir. 1985) (consolidated appeals)—insofar as it concerns the state claims in both cases.

[4] We use the term "arbitrable" to refer to the enforceability of a pre-claim agreement to arbitrate by a securities professional as against a non-professional. The arbitrability of 10b-5 claims pursuant to a post-claim agreement, or without either parties' objection or between securities professionals, *see infra* p.1037, is not at issue here and is hence beyond the scope of this opinion.

under an agreement otherwise enforceable under the United States Arbitration Act, 9 U.S.C. §§ 1-14.

The Supreme Court has not extended *Wilko* to 10b-5 actions. In fact, in *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1974), the Court noted that

> a colorable argument could be made that even the semantic reasoning of the *Wilko* opinion does not control [in a 10b-5 case]. *Wilko* concerned a suit brought under § 12(2) of the Securities Act of 1933, which provides a defrauded purchaser with the "special right" of a private remedy for civil libability .... There is no statutory counterpart of § 12(2) in the Securities Exchange Act of 1934, and neither § 10(b) of that Act nor Rule 10b-5 speaks of a private remedy to redress violations .... While federal case law has established that § 10(b) and Rule 10b-5 create an implied private cause of action ... the Act itself does not establish the "special right" that the Court in *Wilko* found significant. Furthermore, while both the [1933 and 1934 Acts] contain sections barring waiver of compliance with any "provision" of the respective Acts, certain of the "provisions" of the 1933 Act that the Court held could not be waived by Wilko's agreement to arbitrate find no counterpart in the 1934 Act. In particular, the Court in *Wilko* noted that the jurisdictional provision of the 1933 Act ... allowed a plaintiff to bring suit "in any court of competent jurisdiction—federal or state—and removal from a state court is prohibited." ... The analogous provision of the 1934 Act, by contrast, provides for suit only in the federal district courts ... thus significantly restricting the plaintiff's choice of forum.

Id. at 513-14, 94 S.Ct. at 2454-55. Despite this statement, however, the Court did not actually decide the issue of 10b-5 arbitration in *Scherk;* the case was instead decided on another, narrower ground.

It was after *Scherk* that the former fifth circuit decided *Sibley*. The court noted the "colorable argument" suggested

in *Scherk* but nevertheless affirmed the rulings of several lower courts which had held 10b-5 claims non-arbitrable. The court reasoned that "the similarities between the [1933 and 1934 Acts] far outweigh any differences which might exist . . . ." 543 F.2d at 543 n.3. The *Belke* court merely cited and followed *Sibley*.

Then came *Byrd*. The Court in a footnote reiterated the "colorable argument" from *Scherk*, and added the following:

> The Court [in *Scherk*] did not . . . hold that *Wilko* would not apply in the context of a § 10(b) or Rule 10b-5 claim, and *Wilko* has retained considerable vitality in the lower federal courts. Indeed, numerous District Courts and Courts of Appeals have held that the *Wilko* analysis applies to claims arising under § 10(b) . . . and that agreements to arbitrate such claims are therefore unenforceable . . . .
>
> Dean Witter and *amici* representing the securities industry urge us to resolve the applicability of *Wilko* to claims under § 10(b) and Rule 10b-5. We decline to do so.

470 U.S. at n.1, 105 S.Ct. at 1240 n.1. In a concurring opinion, Justice White reemphasized that whether 10b-5 claims are arbitrable was "a matter of substantial doubt," and expanded on *Scherk's* reasoning as to why the *Wilko* analysis might be inappropriate in the 10b-5 context. *Id.*, 105 S.Ct. at 1244 (White, J., concurring).

III.

A.

The differences noted by the Supreme Court in *Scherk* and *Byrd* between the section 12(2) action held non-arbitrable in *Wilko* and the 10b-5 action at issue here are significant enough to merit discussion. Indeed, in light of *Scherk* and *Byrd* we are inclined to agree with appellants that *Wilko* is distinguishable from this case and hence is not "controlling" in the narrow sense of the term. That *Wilko* may be distinguished, however, does not necessarily mean that *Wilko* should not be followed. Our task is to determine whether,

despite the differences, the similarities between the section 12(2) and 10b-5 causes of action are such that under the circumstances it makes sense to follow *Wilko* and thus to hold that 10b-5 claims, like those arising under section 12(2), are not subject to arbitration.

B.

Although not discussing the issue in detail, the panel in *Sibley* concluded that the holding of *Wilko* is applicable to 10b-5 cases because the similarities between section 12(2) and 10b-5 actions outweigh the differences. We too find the similarities more compelling.

The purpose of the 1933 and 1934 Acts is the same: "to protect investors" by requiring "full and fair disclosure" in connection with securities transactions. *See Wilko*, 346 U.S. at 431, 74 S.Ct. at 184; *Rudolph v. Arthur Andersen & Co.*, 800 F.2d 1040, 1043 (11th Cir. 1986). One act concerns itself with the issuance of securities and the other with post-issuance transactions, but that does not suggest that they should be treated differently with respect to arbitration.

Both section 12(2) and 10b-5 "create [ ] a special right to recover for misrepresentation which differs substantially from the common-law action." *Wilko*, 346 U.S. at 431, 74 S.Ct. at 184. In finding section 12(2) to create a "special right" the Wilko Court focused on the fact that under section 12(2) the defendant "is made to assume the burden of proving lack of scienter." *Wilko*, 346 U.S. at 431, 74 S.Ct. at 184. This is not so under 10b-5. *See Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193, 96 S.Ct. 1375, 1380, 47 L.Ed.2d 668 (1976) (under 10b-5 plaintiff must plead and prove defendant's scienter). Nevertheless, the 10b-5 action is also a special one unknown at common law.

> Together the section and the rule aim at reaching "misleading or deceptive activities, whether or not they are precisely and technically sufficient to sustain a common law action . . . ." They are . . . designed to encompass the infinite variety of devices that are alien to the "climate of fair dealing" . . . that Congress sought to create and maintain.

Herpich v. Wallace, 430 F.2d 792, 802 (5th Cir. 1970).

Scherk and *Byrd* correctly point out that the section 12(2) action is expressly provided for, while the 10b-5 action is merely implied. To our knowledge the only suggestion as to how the express/implied distinction makes any difference was by Justice White in his concurrence in *Byrd*. Justice White observed that the *Wilko* Court found significance in the fact that a section 12(2) plaintiff was given the right to choose either a state or federal forum. *Byrd*, 105 S.Ct. at 1244 (White, J., concurring). Noting that the 1933 Act declares "void" any attempt to "waive compliance" with the Act, *see* 15 U.S.C. § 77n, the Court in *Wilko* found that a provision compelling arbitration amounts to an agreement by the securities buyer to waive his right to select the forum and hence is void. *Wilko*, 346 U.S. at 434-35, 74 S.Ct. at 186-87. Justice White in *Byrd* noted the existence of a similar prohibition in the 1934 Act against "waiv[ing] compliance with any provision of this chapter," but found it inapplicable since the 10b-5 action was merely implied and hence literally not a "provision of this chapter." *See* 470 U.S. at , 105 S.Ct. at 1244 (White, J., concurring) (citing 15 U.S.C. § 78cc(a)).[5]

We respectfully disagree. The 1934 Act provides that the federal courts are to have "exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder." 15 U.S.C. § 78aa. This sweeping language applies to all actions brought under the 1934 Act, including implied actions such as the 10b-5 action. *See Clark v. Watchie*, 513 F.2d 994, 997 (9th Cir.) (*citing Abramson v. Pennwood Investment Corp.*, 392 F.2d 759, 762 (2d Cir.

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[5] The same provision also prohibits waiver of compliance with "any rule or regulation" promulgated under the Act. 15 U.S.C. § 78cc(a). Under Justice White's reasoning, however, the provision is still not violated by an agreement to arbitrate 10b-5 claims since such an agreement does not waive compliance with the actual rule, but only bars resort to the implied judicial remedy.

1968)), *cert. denied*, 423 U.S. 841, 96 S.Ct. 72, 46 L.Ed.2d 60 (1975). Regardless of whether the 10b-5 action itself is considered a "provision of this chapter," the exclusive jurisdiction provision is undisputably such a "provision," which, under the *Wilko* rationale, should not be considered waivable.[6]

The *Wilko* Court did not rest its decision solely on the statutory prohibition against waiver. It also noted policy reasons for protecting a potential plaintiff's right to select the forum.

> When the security buyer, prior to any violation of the Securities Act, waives his right to sue in courts, he gives up more than would a participant in other business transactions. The security buyer has a wider choice of courts and venue. He thus surrenders one of the advantages the Act gives him and surrenders it at a time when he is less able to judge the weight of the handicap the Securities Act places upon his adversary.

346 U.S. at 435, 74 S.Ct. at 187. This reasoning is not precisely applicable in the 10b-5 context, since federal jurisdiction over 10b-5 claims is exclusive, but the Court's concern with a security buyer surrendering his advantage nevertheless applies with nearly equal force. Although 10b-5 does not give a plaintiff the right to choose either federal or state court, it does permit a plaintiff to obtain a federal forum without having to meet the requirements of diversity jurisdiction—something which, for one reason or another, plaintiffs often find advantageous.

The *Wilko* Court also expressed some doubts about the effectiveness of arbitration in protecting the rights of the plaintiff. The Court noted that in a section 12(2) case the arbitrators' determinations as to the legal meaning of such key terms as "material fact" could not be examined, and

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[6] The 1934 Act thus includes "protection against waiver of the right to a judicial forum." *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, U.S. , 105 S.Ct. 3346, 3355, 87 L.Ed.2d 444 (1985).

concluded that "[a]s the protective provisions of the Securities Act require the exercise of judicial discretion to fairly assure their effectiveness, it seems to us that Congress must have intended [the anti-waiver provision] to apply to waiver of judicial trial and review." 346 U.S. at 436-37, 74 S.Ct. at 187-88.

This particular rationale for *Wilko* may be less compelling today in light of the Supreme Court's belief that "we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, U.S. , , 105 S.Ct. 3346, 3354, 87 L.Ed.2d 444 (1985). Be that as it may, to our knowledge the Supreme Court has not suggested that *Wilko* should no longer be applied in its own context of section 12(2) cases. The Court may have concluded, and in any event it is our belief, that the *Wilko* Court's other justifications for its decision are sufficient to give *Wilko* continuing force even though the Court's attitude toward arbitration has changed since *Wilko* was decided. It is those other justifications, considered at length above, which we find persuasive in convincing us that there is no principled ground for distinguishing between sections 12(2) and 10(b) with respect to arbitration.

IV.

Congress' 1975 amendments to the securities laws reinforce our determination that 10b-5 claims are not arbitrable. The 1975 amendments enacted the "most substantial and significant revision of this country's federal securities laws since the passage of the Securities Exchange Act of 1934." *Securities Acts Amendments of 1975: Hearings on S. 249 Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing & Urban Affairs*, 94th Cong., 1st Sess. 1 (1975). As part of that revision Congress enacted a provision, 15 U.S.C. § 78bb(b), which had the effect of specifically permitting compulsory arbitration of securities claims between securities

professionals. The conference report accompanying the legislation stated that

> [i]t was the clear understanding of the conferees that this amendment did not change existing law, as articulated in *Wilko v. Swan*, 346 U.S. 427, [74 S.Ct. 182, 98 L.Ed.168] (1953), concerning the effect of arbitration proceeding provisions in agreements entered into by [other] persons dealing with members and participants of self-regulatory organizations. [i.e., securities professionals].
>
> H.R. Rep. No. 229, 94th Cong., 1st Sess. 91, 111 (1975), *reprinted* in 1975 U.S. Code Cong. & Ad. News at 179, 321.

This is not a particularly clear statement of congressional intent. Indeed, both sides in the controversy before us rely on this language to support their positions. Appellees contend that Congess meant to endorse *Wilko* and the line of lower court cases extending *Wilko* to 10b-5 cases. Appellants, noting that few lower courts had yet considered the applicability of *Wilko* to 10b-5 claims, argue that Congress was aware of the then-recent *Scherk* decision and meant to confirm that *Wilko* did *not* extend to 10b-5 claims.

We are inclined to reject both of these interpretations and instead take the statement at face value, as an endorsement of *Wilko* itself and nothing more. Yet we note that Congress, in enacting a provision which it recognized would permit arbitration between securities professionals, declined to take further action. Congress was presumably aware that courts had begun to extend *Wilko* to 10b-5 claims, *see, e.g., Greater Continental Corp. v. Schechter*, 422 F.2d 1100, 1103 (2d Cir. 1970), and that the Supreme Court's only response had been to note in *Scherk* that there was a "colorable argument" that *Wilko* was "not controlling" in such cases. Yet Congress passed up a clear opportunity to disavow this trend. We recognize that an inference from congressional silence is of somewhat limited value, and we would reach the same result without taking the 1975 amendments into account. Nevertheless, Congress's failure to halt the application of

Wilko to 10b-5 in 1975, or at any point since then,[7] is at least some evidence that Congress "has been satisfied with, and adopted, the construction given to its enactment by the courts." *Electric Storage Battery Co. v. Shimadzu*, 307 U.S. 5, 14, 59 S.Ct. 675, 681, 83 L.Ed. 1071 (1939).

V.

Since *Sibley* was decided, a number of other circuits have considered whether 10b-5 claims are arbitrable. Each was aware of the "colorable argument" set forth in *Scherk* that 10b-5 claims are arbitrable. Nevertheless, with but one exception[8] each court has held that they are not. *See McMahon v. Shearson/American Express, Inc.*, 788 F.2d 94, 98 (2d Cir. 1986); *De Lancie v. Birr, Wilson & Co.*, 648 F.2d 1255, 1258-59 (9th Cir. 1981) (unspecified "churning" case); *Mansbach v. Prescott, Ball & Turben*, 598 F.2d 1017, 1030 (6th Cir. 1979); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Moore*, 590 F.2d 823-29 (10th Cir. 1978); *Weissbuch v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 558 F.2d 831, 833-36 (7th Cir. 1977); *Ayres v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 538 F.2d 532, 536 (3d Cir.), *cert. denied*, 429 U.S. 1010, 97 S.Ct. 542, 50 L.Ed.2d 619 (1976). Only one of these decisions, holding 10b-5 claims non-arbitrable, *McMahon*, was also handed down after the Supreme Court's repetition of the *Scherk* argument in *Byrd*, but *Byrd* added nothing to *Scherk*. The majority decision in *Byrd* simply cited *Scherk*, noted the lower court precedent and reiterated that for the Court, whether 10b-5 claims are arbitrable is an open question.

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[7] Several less significant amendments have been made since 1975.

[8] In a 2-1 panel decision, the eighth circuit recently became the only circuit to hold that agreements to arbitrate 10b-5 claims are enforceable. *Phillips v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 795 F.2d 1393 (8th Cir. 1986). The court essentially adopted the "colorable argument" set forth in *Scherk* and *Byrd* and Justice White's augument in his *Byrd* concurrence. We have discussed those arguments and our reasons for rejecting them at length above. *See supra* part IIB.

We are aware that a number of district courts in this circuit have determined that pre-claim agreements to arbitrate 10b-5 claims are enforceable. They were mistaken in doing so. *Sibley* was the law in the former fifth circuit since 1976 and in this circuit since its formation. *Sibley* cited *Scherk* and declined to adopt its "colorable argument." *Byrd*, again, added nothing new. We recognize that the Supreme Court considers the issue open and may at some point expressly limit or overrule *Wilko*, but we agree with the second circuit that

> it would be improvident for us to disregard clear judicial precedent in this Circuit based on mere speculation. We think that the orderly administration of justice will be best served if we as one of the inferior courts follow Supreme Court precedent and adhere to the settled law of this Circuit, and a fortiori the district courts should do likewise.

McMahon, 788 F.2d at 98.

The district court's judgment in No. 85-3352 is AFFIRMED in part and REVERSED in part with directions that the district court grant the motion to arbitrate the state law claims. The district court's judgment in No. 85-5419 is AFFIRMED.[9]

TJOFLAT, Circuit Judge, concurring in which HILL, Circuit Judge, joins:

Section 14 of the Securities Act of 1933 (1933 Act) provides as follows: "Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and

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[9] Appellee Gorman also argues that arbitration of his 10b-5 claim is precluded by SEC Rule 15c2-2, 17 C.F.R. § 240.15c-2. This argument is properly before us since a district court's judgment may be affirmed on any ground, regardless of whether the ground was relied upon by the district court. *Bickford v. International Speedway Corp.*, 654 F.2d 1028, 1031 (5th Cir. Unit B 1981). In light of our holding on the *Wilko* issue, however, we need not reach the issue today.

regulations of the Commission shall be void." 15 U.S.C. § 77n (1982). In *Wilko v. Swan*, 346 U.S. 427, 74 S.Ct. 182, 98 L.Ed. 168 (1953), the Supreme Court held that this provision rendered unenforceable an agreement to arbitrate a future controversy arising under section 12(2) of the 1933 Act, 15 U.S.C. § 771(2) (1982). Absent section 14, the agreement to arbitrate would have been enforceable pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 1-14 (1982). The issue before the en banc court is whether an agreement to arbitrate a future controversy arising under section 10(b) of the Securities Exchange Act of 1934 (1934 Act), 15 U.S.C. § 78j(b) (1982), is enforceable.

The 1934 Act contains a provision that is nearly identical to section 14 of the 1933 Act. Section 29 of the 1934 Act contains the following language: "Any condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void." 15 U.S.C. § 78cc(a) (1982). The Supreme Court in *Wilko* held that section 14 of the 1933 Act took precedence over the policies underlying the Federal Arbitration Act and prevented enforcement of an agreement to arbitrate a 1933 Act dispute. Section 29 of the 1934 Act essentially replicates section 14 of the 1933 Act. Under the teaching of *Wilko*, therefore, we must conclude that section 29 of the 1934 Act overrides the Federal Arbitration Act and renders unenforceable agreements to arbitrate 1934 Act disputes. There is no principled means of arriving at a contrary interpretation regarding the 1933 and 1934 Acts.

It is of no avail to attempt to draw the distinction that a section 12(2) private cause of action is expressly provided for in the statute whereas a section 10(b) private action is implied. To say that a private cause of action is implied is to say that Congress intended such an action to exist. *See*, e.g., *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 377-78, 102 S.Ct. 1825, 1838-39, 72 L.Ed.2d 182 (1982); *Transamerica Mortgage Advisors, Inc. v Lewis*, 444 U.S. 11, 15-16, 100 S.Ct. 242, 245, 62 L.Ed.2d 146 (1979). It is as if Congress explicitly provided for the cause of action.

Because Congress intended to create a section 10(b) cause of action, it also intended section 29 to be applicable to it, and the inquiry before us is no different than the one before the Court in *Wilko*.

Were I writing on a clean slate, I might well be inclined to reach a result contrary to the *Wilko* Court. Section 14 of the 1933 Act renders void any provision binding a security purchaser to "waive compliance with any provision of this subchapter" or the relevant rules and regulations thereunder. 15 U.S.C. § 77n (1982). A fair reading of this statute would prevent a purchaser from waiving a seller's compliance with the substantive provisions of the Act, i.e., its reporting and disclosure requirements. By agreeing to arbitrate, the purchaser does not waive the Act's protections, but merely agrees to enforce the Act's provisions in a forum other than the courts. We must follow *Wilko*, however, and I accordingly concur fully in the court's holding that section 10(b) claims are not subject to pre-dispute arbitration agreements.[10]

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[10] In addition to the constraints imposed by the *Wilko* decision, I also recognize that in the years following *Wilko*, the Congress may have indicated its satisfaction with the state of the law in this area.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 84-1299-CIV-NESBITT

JOSEPH GORMAN,

Plaintiff,

vs.

MERRILL LYNCH PIERCE FENNER & SMITH, INC.,

Defendant.

ORDER

THIS CAUSE is before the Court upon the Defendant's Amendment to Second Motion to Dismiss or Compel Arbitration. As this amendment requests this Court to compel arbitration of Count I of the Plaintiff's Complaint, the Court views the Amendment as a Motion to Compel Arbitration of Count I. The Defendant relies upon *Dean Witter Reynolds, Inc. v. Byrd*, 53 U.S.L.W. 4222 (U.S. March 4, 1985) and *Niven v. Dean Witter Reynolds, Inc.*, No. 84-1594-Civ-T-10 (M.D. Fla. March 28, 1985).

Count I of the Plaintiff's Complaint states a cause of action under Section 10(b) and Rule 10b-5 of the Securities and Exchange Act of 1934. The Defendant urges that arbitration of this claim, pursuant to an arbitration agreement entered into between the parties, is appropriate in light of the recent United States Supreme Court ruling in *Dean Witter Reynolds, Inc. v. Byrd*, 53 U.S.L.W. at 4222. In this opinion, the Court rejected the doctrine of "intertwining"[1] and held that the simultaneous arbitration of the Plaintiff's state law claims was appropriate. In dicta, the Court intimated that the *Wilko* doctrine of nonarbitrability[2] might not apply to actions

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[1] "When arbitrable and nonarbitrable claims arise out of the same transaction, and are sufficiently intertwined factually and legally, the district court, under this view, may in its discretion deny arbitration as to the arbitrable claims and try all the claims together in federal court." *Byrd*, 53 U.S.L.W. at 4223.

[2] Pointing to language in § 14 of the Securities Act of 1933, 15 U.S.C. § 77n, which declares "void" any "stipulation" waiving compliance with any "provision" of the Securities Act, the Court held that an agreement to arbitrate claims arising under § 12(2)

(footnote continued on next page)

brought under the Securities and Exchange Act of 1934. However, the Court declined the opportunity to decide this issue as Dean Witter had not raised the question in the district court below.

Based on the Supreme Court's language in *Byrd*, the Defendant argues that "very severe doubts" have arisen as to the applicability of the *Wilko* doctrine to claims arising under § 10(b) which "open the previously shut window to new and further scrutiny of arbitrability of § 10(b) claims." The Court specifically declined to pass upon the *Wilko* doctrine. The Court does not find the *Byrd* decision as overruling the Eleventh Circuit's decision that claims arising under § 10(b) and Rule 10b-5 are nonarbitrable. *See Belke v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 693 F.2d 1023 (11th Cir. 1982); *Sibley v. Tandy Corp.*, 543 F.2d 540 (5th Cir. 1976). *But see Niven* v. *Dean Witter Reynolds, Inc.*, No. 84-1594-Civ-T-10 (M.D. Fla. March 28, 1985). Accordingly, the Defendant's Motion to Compel Arbitration of Count I is hereby DENIED. The Defendant shall respond to Count I of the Plaintiff's Complaint within twenty (20) days of the date of the entry of this Order.

In light of the fact that this Court has denied the Defendant's Motion to Compel Arbitration of Count I, it is further ORDERED AND ADJUDGED that the Defendant's Motion for Protective Order and for Enlargement of Time and to Stay Discovery is hereby DENIED. Discovery in this matter shall proceed in accordance with the Federal Rules of Civil Procedure.

DONE AND ORDERED at Miami, Dade County, Florida, this *22nd* day of April, 1985.

/s/
LENORE C. NESBITT
U.S. DISTRICT JUDGE

cc: Bennett Falk, Esq.
Karen A. Gievers, Esq.

(footnote continued from preceding page)
was unenforceable as waiving the right to seek a judicial remedy. *Wilko v Swan*, 346 U.S. 427 (1953).

APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION
CASE NO. 84-151-Civ-ORL-18

FREDERICK J. WOLFE and
HEATHER B. WOLFE, his wife,

Plaintiffs,

vs.

E.F. HUTTON & COMPANY INC.
and PETER PANOS,

Defendants.

MOTION TO DISMISS OR TO COMPEL ARBITRATION

DENIED and SO ORDERED this
30 day of March, 1985

/s/
G. KENDALL SHARP
United States District Judge

Defendants, E.F. HUTTON & COMPANY, INC. ("HUTTON") and PETER PANOS ("PANOS"), by and through their undersigned counsel, moves this Court pursuant to F.R.Civ.P. 12(b)(2), (3) and (6) and 9(b) to dismiss this suit or, alternatively, to compel arbitration of this dispute, for the reasons set forth in the accompanying Memorandum of Law.

MEMORANDUM OF LAW

This is a suit for alleged churning of a securities account maintained by Plaintiffs with HUTTON at its Salem, Massachusetts branch office. Defendant, PANOS was the account executive for Plaintiffs' account. Count I of the Complaint purports to join claims for violation of § 17(a) of the Securities Act of 1933, 15 U.S.C. § 77q, § 10b of the Securities Exchange Act of 1934, 15 U.S.C. § 78j and the Florida Securities Act, § 517.301, Florida Statutes. Counts II, III and IV purport to allege Florida common

APPENDIX D

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION
CASE NO. 84-151-Civ-ORL-18

FREDERICK J. WOLFE and
HEATHER B. WOLFE, his wife,

Plaintiffs,

vs.

E.F. HUTTON & COMPANY INC.
and PETER PANOS,

Defendants.

DEFENDANTS' MOTION FOR RECONSIDERATION AND MEMORANDUM OF LAW IN SUPPORT THEREOF

DENIED and SO ORDERED this
30 day of March, 1985

/s/
G. KENDALL SHARP
United States District Judge

Defendants, E.F. HUTTON & COMPANY, INC. and PETER PANOS, by and through their undersigned counsel, respectfully move this Court to reconsider its March 30, 1985 Order, denying Defendants' Motion to Compel Arbitration, for the reasons set forth below.

MEMORANDUM OF LAW

On March 4, 1985, the United States Supreme Court decided *Dean Witter Reynolds v. Byrd,* —U.S.—, 53 U.S.L.W. 4222 (March 4, 1985). *Byrd* stands for the proposition that the Federal Arbitration Act requires district courts to compel arbitration of pendent arbitrable claims when one of the parties files a Motion to Compel, even when the result would be the possibly inefficient maintenance of separate proceedings in different forums.

Defendants filed their Notice of Reliance upon Supplemental Authority on March 26, 1985, (a copy of which is attached hereto

APPENDIX E

APPENDIX E

District Court Decisions Concerning The Enforceability Of Agreements To Arbitrate Section 10(b) Claims

A. Cases Holding Section 10(b) Claims Arbitrable

First Circuit

Arent v. Shearson/American Express, Inc., Fed.Sec.L.Rep. (CCH) ¶92,523 (D.Mass. Dec. 20, 1985)

Mowbray v. Moseley, Hallgarten, Estabrook & Weden, Inc., No. 83-2851-C (D.Mass. July 16, 1985), *vacated*, No. 85-1647 (1st Cir. July 3, 1986)

Prawer v. Dean Witter Reynolds, Inc., 626 F.Supp. 642 (D.Mass. 1985)

Sevinor v. Merrill Lynch, Pierce, Fenner & Smith, No. 84-3240-N (D.Mass. July 19, 1985)

Second Circuit

Brener v. Becker Paribas, Inc., 628 F.Supp. 442 (S.D.N.Y. 1985)

Finkle & Ross v. A.G. Becker Paribas, Inc., 622 F.Supp. 1505 (S.D.N.Y. 1985)

Ilan v. Shearson/American Express, Inc., 632 F.Supp. 886 (S.D.N.Y. 1985)

Intre Sport Ltd. v. Kidder Peabody & Co., 625 F.Supp. 1303 (S.D.N.Y. 1985), *modified*, Fed.Sec.L.Rep. (CCH) ¶92,714 (S.D.N.Y. April 21, 1986)

Jarvis v. Dean Witter Reynolds, Inc., 614 F.Supp. 1146 (D.Vt. 1985)

Johnson v. Kidder Peabody & Co., No. 85 Civ. 178 (N.D.N.Y. July 29, 1985)

McMahon v. Shearson/American Express, Inc., 618 F.Supp. 384 (S.D.N.Y. 1985), *aff'd. in part, rev'd in part*, 788 F.2d 94 (2d Cir. 1986)

Shamir v. Kidder, Peabody & Co., Fed.Sec.L.Rep. (CCH) ¶92,511 (S.D.N.Y. Mar. 11, 1985)

Terra Resources I v. Burgin, Fed.Sec.L.Rep. (CCH) ¶92,703 (S.D.N.Y. Apr. 1, 1986)

Wall Street Assocs. v. Becker Paribas, Inc., No. 85 Civ. 4649 (S.D.N.Y. Sept. 19, 1985)

Third Circuit

Baker v. Paine, Webber, Jackson & Curtis, Inc., [Current] Fed.Sec.L.Rep. (CCH) ¶92,757 (D.N.J. Apr. 10, 1986)

Fourth Circuit

Fisher v. Prudential-Bache Securities, Inc., No. Y-86-388 (D.Md. May 12, 1986)

Land v. Dean Witter Reynolds, Inc., 617 F.Supp. 52 (E.D.Va. 1985)

Shotto v. Laub, 632 F.Supp. 516 (D.Md. 1986)

Fifth Circuit

Coonly v. Rotan Mosle, Inc., No. A-83-CA-529 (W.D.Tex. June 11, 1985)

Frye v. Paine, Webber, Jackson & Curtis, [1985-86 Transfer Binder] Fed.Sec.L.Rep. (CCH) ¶92,516 (N.D.Tex. Dec. 26, 1985)

Hymel v. Delta Petroleum & Energy Corp., No. SA-83-CA-362 (W.D.Tex. June 19, 1985)

Sixth Circuit

Gerhardstein v. Shearson/American Express, Inc., [1985-86 Transfer Binder] Fed.Sec.L.Rep. (CCH) ¶92,512 (N.D.Ohio Mar. 10, 1986)

Moncrieff v. Merrill Lynch, Pierce, Fenner & Smith Inc., 623 F.Supp. 1005 (E.D.Mich. 1985)

Yee v. Merrill Lynch, Pierce, Fenner & Smith Inc., No. 84-4017 (E.D.Mich. Marc. 31, 1986)

Seventh Circuit

Austad v. Drexel Burnham Lambert, Inc., No. 85-C-9759 (N.D.Ill. Mar. 27, 1986)

Steinberg v. The Illinois Co., No. 85-C-7131 (N.D.Ill. May 15, 1986)

Willis v. Prudential-Bache Securities, Inc., No. L 85-0959 (N.D.Ind. July 10, 1985)

Eighth Circuit

Bob Ladd, Inc. v. Adcock, 633 F.Supp. 241 (E.D.Ark. 1986)

Houlihan v. Schmacker and Meyer v. Schmacker, Nos. 83-159 C(5) and 83-1356 C(5) (E.D.Mo. May 3, 1985)

Peele v. Kidder, Peabody & Co. Inc., 620 F.Supp. 61 (W.D.Mo. 1985) (appeal pending)

Sulit v. Dean Witter Reynolds, Inc., [Current] Fed.Sec.L.Rep. (CCH) ¶92,755 (W.D.Mo. Mar. 27, 1986)

Ninth Circuit

Anderson v. Paine Webber Jackson & Curtis, [1985-86 Transfer Binder] Fed.Sec.L.Rep. (CCH) ¶92,446 (C.D.Cal. Sept. 23, 1985)

Byrd v. Dean Witter Reynolds, Inc., [1985-86 Transfer Binder] Fed.Sec.L.Rep. (CCH) ¶92,225 (S.D.Cal. July 8, 1985) (on remand from Supreme Court)

Dees v. Distenfield, 618 F.Supp. 123 (C.D.Cal. 1985)

Geller v. Nasser, [1985-86 Transfer Binder] Fed.Sec.L.Rep. (CCH) ¶92,409 (C.D.Cal. Nov. 18, 1985)

Jope v. Bear Stearns & Co., [1985-86 Transfer Binder] Fed.Sec.L.Rep. (CCH) ¶92,393 (N.D.Cal. Nov. 15, 1985)

Mann v. Foster & Marshall/American Express, Inc., No. C84-925D (W.D.Wash. June 3, 1985)

Marx v. Dean Witter Reynolds, Inc., [1985-86 Transfer Binder] Fed.Sec.L.Rep. (CCH) ¶92,311 (C.D.Cal. Aug. 23, 1985)

Sacks v. Dean Witter Reynolds, Inc., [1985-86 Transfer Binder] Fed.Sec.L.Rep. (CCH) ¶ 92,429 (C.D.Cal. Dec. 31, 1985)

Schultz v. Robinson-Humphrey/American Express, Inc., Fed.Sec.L.Rep. (CCH) ¶ 92,515 (M.D.Ga. Marc. 4, 1986)

West v. Drexel Burnham Lambert, Inc., 623 F.Supp. 26 (W.D.Wash. 1985)

Tenth Circuit

Balkely v. Prudential-Bache Securities, Inc., No. A-85-442-BRT (D.Nev., Dec. 9, 1985)

Eleventh Circuit

Ackerman v. Drexel Burnham Lambert, Inc., Case No. 84-6739-Civ-Hastings (S.D.Fla. May 14, 1985)

Adrian v. Smith Barney, Harris Upham & Co., Inc., Case No. 84-1652-Civ-T-13 (M.D.Fla. Sept. 17, 1985), *appeal pending*, Case Nos. 85-3816 and 86-3009

Batteh v. Prudential-Bache Securities, Inc., Case No. 84-452-Civ-J-14 (M.D.Fla. July 29, 1985)

Boyd v. Merrill Lynch, Pierce, Fenner & Smith Inc., 614 F.Supp. 940 (S.D.Fla. 1985)

Byrne v. Oppenheimer & Co., Inc., Case No. 84-264-Civ-T-17 (M.D.Fla. Aug. 2, 1985)

Chandler v. Drexel Burnham Lambert, Inc., No. C-85-1585-A (N.D.Ga. Oct. 29, 1985) (appeal pending)

Colangelo v. Dean Witter Reynolds, Inc., [1985-86 Transfer Binder] Fed.Sec.L.Rep. (CCH) ¶92,365 (M.D.Fla. July 23, 1985)

Driscoll v. Smith Barney, Harris Upham & Co., No. 84-8223 (S.D.Fla. June 6, 1985), *appeal pending*, Case No. 85-5921

Finn v. Davis, 610 F.Supp. 1079 (S.D.Fla. 1985)

Greenstein v. First Biscayne Corp., No. 82-0584 Civ. (S.D.Fla. May 16, 1985)

Gregory v. Merrill Lynch, Pierce, Fenner & Smith, No. 84-1647-Civ.-1-10 (M.D.Fla. April 9, 1985)

Greist v. Merrill Lynch, Pierce, Fenner & Smith Inc., Case No. 83-6826-Civ-Hoeveler (S.D.Fla. Aug. 23, 1985)

Hashemi v. Merrill Lynch, Pierce, Fenner & Smith Inc., Case No. C82-2948A (N.D.Ga. Aug. 6, 1985)

Leffler v. Prudential-Bache Securities, Inc., Case No. CV184-93 (S.D.Ga. Aug. 29, 1985)

Miller v. Drexel Burnham Lambert, Inc., No. 83-6871 (S.D.Fla. July 31, 1985), *rev'd*, 791 F.2d 850 (11th Cir. 1986) (per curiam)

Niven v. Dean Witter Reynolds, Inc., [1984-85 Transfer Binder] Fed.Sec.L.Rep. (CCH) ¶92,059 (M.D.Fla. Mar. 28, 1985)

Oliver v. Harris, Case No. CV184-93 (S.D.Ga. Aug. 29, 1985)

Pruzan v. Paine, Webber, Jackson & Curtis, No. C84-2016A (N.D.Ga. Aug. 30, 1985)

Raiford v. Merrill Lynch, Pierce, Fenner & Smith, [1985-86 Transfer Binder] Fed.Sec.L.Rep. (CCH) ¶92,269 (N.D.Ga. May 16, 1985)

Resnick v. Oppenheimer & Co., Inc., Case No. 85-681-Civ-T-17 (M.D.Fla. Aug. 2, 1985)

Rockoff v. Shearson Lehman/American Express, Inc., [1985-86 Transfer Binder] Fed.Sec.L.Rep. (CCH) ¶92,513 (S.D.Fla. Feb. 12, 1986)

Ross v. Mathis, 624 F.Supp. 110 (N.D.Ga. 1985)

Sanders v. Robinson Humphreys/American Express, Inc., Fed.Sec.L.Rep. (CCH) ¶92,548 (N.D.Ga. Mar. 27, 1986)

Schultz v. Robinson-Humphrey/American Express, Inc., [Current] Fed.Sec.L.Rep. (CCH) ¶92,515 (M.D.Ga. Mar. 4, 1986)

Walch v. Dean Witter Reynolds, Inc., [1985-86 Transfer Binder] Fed.Sec.L.Rep. (CCH) ¶92,060 (M.D.Fla. Apr. 25, 1985)

Westwind Transp., Inc. v. Merrill Lynch, Pierce, Fenner & Smith Inc., No. 84-734 (M.D.Fla. Apr. 9, 1985)

B. Cases Holding Section 10(b) Claims Not Arbitrable

District of Columbia Circuit

Kalali v. Prudential-Bache Securities, Inc., No. 85-3237 (D.D.C. June 30, 1986)

Second Circuit

Becker v. Silverman, 638 F.Supp. 193 (S.D.N.Y. 1986)

Brill v. Prudential-Bache Securities, Inc., No. 84 Civ. 0846 (S.D.N.Y. June 13, 1986)

Couvaris v. Paine Webber Jackson & Curtis Inc., [1985-86 Transfer Binder] Fed.Sec.L.Rep. (CCH) ¶92,554 (S.D.N.Y. Feb. 24, 1986)

Clark v. Kidder, Peabody & Co., Inc., Fed.Sec.L.Rep. (CCH) ¶92,729 (S.D.N.Y. May 9, 1986)

Farino v. Advest Inc., Fed.Sec.L.Rep. (CCH) ¶92,758 (E.D.N.Y. May 1, 1986)

Gilmore v. Shearson/American Express, Inc., No. 84 Civ. 9011 (S.D.N.Y. May 20, 1986)

Intre Sport, Ltd. v. Kidder, Peabody & Co., Fed.Sec.L.Rep. (CCH) ¶92,714 (S.D.N.Y. Apr. 21, 1986), *aff'd*, 795 F.2d 1004 (2d Cir. 1986), *pet. for cert. filed*, No. 86-40 (July 16, 1986)

IRPA Corp. v. Shearson/American Express, Inc., Case No. 85 Civ. 1629 (S.D.N.Y. May 28, 1986)

Leone v. Advest, Inc., 624 F.Supp. 297 (S.D.N.Y. 1985)

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APPENDIX F

APPENDIX F

Statutory Provisions Involved

Section 2 of the Federal Arbitration Act, 9 U.S.C. § 2:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, of an agreement in writing to submit to arbitration an existing controversy arising out of such contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Section 10 of the Securities Exchange Act of 1934, 15 U.S.C. § 78(j):

> It shall be unlawful for any person, directly or indirectly by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—
>
> (a) To effect a short sale, or to use or employ any stop-loss order in connection with the purchase or sale, of any security registered on a national securities exchange, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.
>
> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Supreme Court, U.S.
FILED
APR 11 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986
No. 86-1218

E.F. HUTTON & COMPANY, INCORPORATED
AND PETER PANOS,

Petitioners,

vs.

FREDERICK J. WOLFE AND
HEATHER B. WOLFE, HIS WIFE,

Respondents.

MERRILL LYNCH, PIERCE, FENNER &
SMITH INCORPORATED,

Petitioner,

vs.

JOSEPH GORMAN,

Respondent.

GORMAN'S RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

KAREN A. GIEVERS, ESQUIRE
KAREN A. GIEVERS, P.A.
Attorney for Respondent
4th Floor Courthouse Tower
44 West Flagler Street
Miami, Florida 33131
(305) 374-0521

Question Presented for Review

The question presented in this case is whether the circuit court erred in affirming the trial court's denial of Merrill Lynch's motion to compel arbitration of Gorman's federal securities law claims.

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Statement of the Case

Gorman sued Merrill for its mishandling of his funds and account. Gorman stated claims against Merrill for violations of the Securities Exchange Act of 1934 and the related rules and regulations of Chapter 517 of the Florida Statutes, for fraud and breach of fiduciary duty and, under Chapter 812 of the Florida Statutes, for civil theft. Merrill moved to compel arbitration, relying on its form language. Merrill made no showing of any compliance with the mandatory disclosure requirements of SEC Rule 15c2-2, 17C.F.R. §240.15c2-2; reflecting the Securities Exchange Commission's position that arbitration of customers' federal securities law claims could not be compelled pursuant to

pre-dispute "agreements" to arbitrate.

On Merrill's motion the district court ordered arbitration of the state law claims, but denied arbitration of Gorman's federal securities law claims. Gorman v. Merrill Lynch Pierce Fenner & Smith, 609 F. Supp. 1054 (S.D. Fla. 1985). Merrill appealed that part of the order denying arbitration of Gorman's federal law claims. After the filing of the briefs and with the oral argument scheduled, Merrill successfully asked the circuit court to consolidate Gorman with E.F. Hutton v. Panos.

The circuit court affirmed the district court's ruling in the consolidated cases, denying arbitration of Gorman's and Wolfe's federal securities law claims. Wolfe v. E.F. Hutton & Co., Inc., 800 F.2d 1032 (11th

Cir. 1986) (en banc). In its opinion, the court recognized the propriety of Gorman's position asserting that the compelled arbitration of the 10b-5 claim is precluded by SEC Rule 15c2-2, 17 C.F.R. Sec. 240.15c2-2; however, the court found it unnecessary to reach the issue. Id., at 1038-1039, fn 9.

Merrill now asks this Court to review the circuit court's ruling, citing inter-circuit conflict and the significance of the arbitrability issue.

Summary of Argument

The circuit court properly affirmed the right of access to the federal courts, and properly denied the brokerage houses' motion to compel arbitration of their customers' federal securities law claims. Certiorari should be denied.

Argument

Gorman's constitutionally protected right to a federal court jury trial of his federal securities claims is intact and is further protected by the provisions of the 1934 Securities and Exchange Act vesting the courts with exclusive jurisdiction over those claims. 15 U.S.C. §78aa. Gorman's rights to have a jury of his peers decide the propriety of Merrill's conduct in light of the 1934 Act is bolstered by the express provisions of SEC Rule 15c2-2.

Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. §78aa vests the federal courts with exclusive jurisdiction of claims brought pursuant to the 1934 Act and the rules and regulations promulgated thereunder.

Section 29 of the Securities Exchange Act of 1934 makes unenforceable any agreement purporting to waive any provision of the Act, or the related rules and regulations. 15 U.S.C. §78cc. The Securities Echange Commission also had recognized the unenforceability of pre-dispute agreements purporting to require arbitration of federal securities law claims; in fact, a brokerage house's failure to tell its customers of that compelled arbitration of federal securities claims is prohibited consitutes a fraudulent misrepresentation. SEC Rule 15c2-2.

The 1934 Act came into existence nine years after Congress' passage of the Federal Arbitration Act relied upon by Merrill Lynch and E.F. Hutton. The 1934 Act reflects the importances of the

federal judicial forum to the Congress' efforts to regulate and control the country's securities markets. That Congress knew of the courts refusal to enforce pre-dispute arbitration agreements and chose not to amend the pertinent statutory provisions relating to customers like Gorman, despite its amendments to other portions of the 1934 Act, cannot be denied.

Gorman cannot deny the post-Byrd[1] existence of inter-circuit conflict. Gorman also cannot in good faith deny the importance and significance of his constitutionally and statutorily protected right of access to the courts and a jury trial. Nevertheless, the record before the court below clearly

supports the circuit court's ruling, and warrants denial of the brokerage houses' petition for writ of certiorari.

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[1]Dean Witter Reynolds, Inc. v. Byrd, ___ U.S. ___, 105 S.Ct. 1238 (1985)

Conclusion

The Eleventh Circuit's ruling denying the compelled arbitration of federal securities law claims should be affirmed. The petition for writ of certiorari should be denied.

Respectfully submitted,

KAREN A. GIEVERS, P.A.
Attorney for Respondent Joseph Gorman

By: Karen A. Gievers
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44 West Flagler Street
Miami, Florida 33130
(305) 374-0521

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was furnished by hand delivery this 10th day of April, 1987 to BENNETT FALK, ESQUIRE and KEITH OLIN, ESQUIRE, Ruden, Barnett, McClosky, Schuster & Russell, P.A., Attorneys for Petitioners, Suite 2020 One Biscayne Tower, 2 South Biscayne Boulevard, Miami, Florida 33131 and by express mail to ELMO R. HOFFMAN, ESQUIRE, Parker, Johnson, Owen & McGuire, Attorneys for Respondents Frederick J. Wolfe and Heather B. Wolfe, 108 East Hillcrest Street, Orlando, Florida 32801.

KAREN A. GIEVERS, P.A.

By: Karen A. Gievers
KAREN A. GIEVERS

APPENDIX

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15 U.S.C. §78cc(a).....A1

17 C.F.R. §240.15c2-2.....A2

Statuory Provisions Involved

15 U.S.C. §78aa:

> The district courts of the United States, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules and regulations there- under, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder..."

15 U.S.C. §78cc(a):

> (a) Any condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or rule or regulation thereu- nder, or of any rule of an exchange required thereby shall be void.

17 C.F.R. §240.15c2-2:

(a) It shall be a fraudulent, manipulative or deceptive act or practice for a broker or dealer to enter into an agreement with any public customer which purports to bind the customer to the arbitration of future disputes between them arising under the Federal securities laws, or to have in effect such an agreement, pursuant to which it effects transactions with or for a customer.

(b) Notwithstanding paragraph (a) of this section, under December 31, 1984 a baroker or dealer may use existing supplies of customer agreement forms if all such agreements entered into with public customers after December 28, 1983 are accompanied by the separate written disclosure:

> Although you have signed a customer agreement form with FIRM NAME that states you are required to arbitrate any future dispute or controversy that may arise between us, you are not required to arbitrate any dispute or contro- versy that arises under the federal securites laws but instead can resolve any such dispute or

controversy through litigation in the courts.

(c) A broker or dealer shall not be in violation of paragraph (a) of this section with respect to any agreement entered into with a public customer prior to December 28, 1983 if:

(1) Any such public customer for whom the broker or dealer has after July 1, 1983

(i) carried a free credit balance, or

(ii) held securities for safekeeping or as collateral, or

(iii) effected a securities transaction is sent, no later than December 31, 1984 the disclosure prescribed in paragraph (b) of this section, or

(2) Any other public customer is sent upon the completion of his next transaction pursuant to such agreement, the disclousre prescribed in paragraph (b) of this section.

Supreme Court, U.S.
FILED
APR 14 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986
Case No. 86-1218

(3)

E. F. HUTTON & COMPANY,
INCORPORATED and PETER PANOS,

Petitioners,

vs.

FREDERICK J. WOLFE AND
HEATHER B. WOLFE, HIS WIFE,

Respondents.

MERRILL LYNCH, PIERCE, FENNER &
SMITH, INCORPORATED,

Petitioner,

vs.

JOSEPH GORMAN,

Respondent.

WOLFES' RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Elmo R. Hoffman, Esq.
Parker, Johnson, Owen
& McGuire, P.A.
108 E. Hillcrest St.
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(305) 425-4910
Attorney for Respondents

QUESTION PRESENTED FOR REVIEW

The question presented in this case is whether the Circuit Court erred in affirming the trial court's denial of E.F. Hutton & Company's Motion to Compel Arbitration of Frederick J. and Heather B. Wolfe's claim under the 1934 Securities Exchange Act.

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15 U.S.C. §78cc	6

STATEMENT OF THE CASE

The Wolfes sued E. F. Hutton for its mishandling of their funds and account. The Wolfes stated claims against Hutton for violations of §17(a) of the Securities Act of 1933 (15 U.S.C. 77[q]) and 10[b] of the Securities Act of 1934 (15 U.S.C. 78[j][b]) and for violations of Florida Statutes, Chapter 517, by "churning", for attorney's fees pursuant to Florida Statutes, Chapter 517 and under state law for breach of fiduciary duty, gross negligence, and outrageous conduct, claiming a right to punitive damages under the state common law claims. E. F. Hutton moved to compel arbitration relying on the language of its customer's agreement with the Wolfes.

The District Court denied Hutton's Motion to Compel Arbitration. Hutton appealed the Order Denying Arbitration. After the filing of briefs and with oral argument scheduled, Hutton successfully asked the Circuit Court to consolidate Wolfe with Gorman v. Merrill Lynch, Pierce, Fenner & Smith.

The Circuit Court affirmed the District Court's ruling denying arbitration of the Wolfes' federal securities law claims, but reversed the District Court's ruling which had denied arbitration on the Wolfes' state law claims, Wolfe v. E. F. Hutton & Company, Inc., 800 F.2d 1032 (11th Cir. 1986) (en banc).

Hutton now asks this Court to review the Circuit Court's ruling on the Wolfe's 1934 Securities Exchange Act

claims, citing inter-circuit conflict and the significance of the arbitrability issue.

SUMMARY OF ARGUMENT

The Circuit Court properly affirmed the right of access to the Federal Courts, and properly denied the brokerage house's Motion to Compel Arbitration of their customers' federal securities law claims. Certiorari should be denied.

ARGUMENT

The Wolfe's constitutionally protected right to a Federal Court jury trial of their 1934 Securities Exchange Act claim is intact and is protected by the provisions of the 1934 Securities Exchange Act vesting the courts with exclusive jurisdiction over those claims. 15 U.S.C. §78aa.

Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. §78aa vests the Federal Courts with exclusive jurisdiction of claims brought pursuant to the 1934 Act and the rules and regulations promulgated thereunder.

Section 29 of the Securities Exchange Act of 1934 makes unenforceable any agreement purporting to waive any provision of the Act, or the related

rules and regulations. 15 U.S.C. §78cc. The Securities Exchange Commission also has subsequently recognized the unenforceability of pre-dispute agreements purporting to require arbitration of federal securities law claims; in fact, a brokerage house's failure to tell its customers that compelled arbitration of federal securities claims is prohibited, now constitutes a fraudulent misrepresentation. S.E.C. Rule 15c2-2.

The 1934 Act came into existence nine years after Congress' passage of the Federal Arbitration Act relied upon by Merrill Lynch and E.F. Hutton. The 1934 Act reflects the importance of the federal judicial forum in Congress' efforts to regulate and control the country's securities

markets. Congress has had every opportunity to know of the courts' refusal to enforce pre-dispute arbitration agreements on 1934 Securities Exchange Act claims and has chosen not to amend the pertinent statutory provisions relating to customers like the Wolfes, despite its various amendments to other portions of the 1934 Act.

The Wolfes cannot deny the post-Byrd[1] existence of inter-circuit conflict. They also cannot in good faith deny the importance and significance of the issue presented here. Nevertheless, the record before the Court below clearly supports the Circuit Court's

---

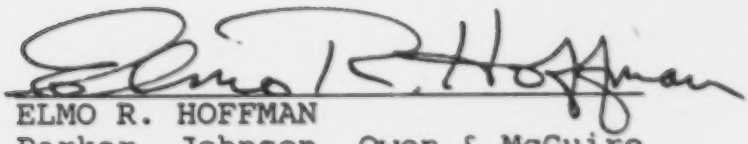
[1] Dean Witter Reynolds, Inc. v. Byrd, _____ U.S. _____, 105 S.Ct. 1238 (1985)

ruling, and warrants denial of the brokerage house's Petition for Writ of Certiorari.

CONCLUSION

The Eleventh Circuit's ruling denying the compelled arbitration of federal securities law claims should be affirmed. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,



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Attorneys for Respondents,
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CERTIFICATE OF SERVICE

I Hereby Certify that forty originals of the foregoing Response to Petition for Writ of Certiorari have been furnished by Federal Express this 13th day of April, 1987 to the Clerk of the U.S. Supreme Court, and by U.S. mail this 13th day of April, 1987 to Karen A. Gievers, Atty., Courthouse Tower, 44 West Flagler Street, Miami, FL 33130 and to Bennett Falk, Esq., One Biscayne Tower, Suite 2020, Two South Biscayne Blvd., Miami, FL 33131.

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